Filed 5/14/19 Marriage of Kim CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of RACHEL and DENNIS KIM.	
RACHEL PETERSON KIM, Appellant, v. DENNIS KIM, Respondent.	D073886 (Super. Ct. No. D552831) ORDER DENYING REHEARING AND MODIFYING OPINION

THE COURT:

The petition for rehearing is DENIED.

It is ordered that the opinion filed on May 10, 2019, be modified to add the following text as a new paragraph at the end of footnote 8:

> "To the extent Husband implicitly assumes in his motion that the final statement of decision is not an appealable order, we disagree. The final statement of decision is signed, filed, refers to itself as "this final order," and concludes, "SO ORDERED." We therefore exercise our discretion to treat it as an appealable order. (See *Alan v. American Honda Motor Co*. (2007) 40 Cal.4th 894, 901 ["Reviewing courts have discretion to treat statements of decision as appealable

when they must, as when a statement of decision is signed and filed and does, in fact, constitute the court's final decision on the merits."]; *Pangilinan v. Palisoc* (2014) 227 Cal.App.4th 765, 769 ["The statement of decision in this case is signed and filed and, given its wording, was clearly intended to constitute the court's final decision on the merits. Hence, we treat it as an appealable order."].)

There is no change in the judgment.

HUFFMAN, Acting P. J.

Copies to: All parties

Filed 5/10/19 Marriage of Kim CA4/1 (unmodified opinion)

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

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In re the Marriage of RACHEL and DENNIS KIM.	
RACHEL PETERSON KIM, Appellant, v. DENNIS KIM, Respondent.	D073886 (Super. Ct. No. D552831)

APPEAL from an order of the Superior Court of San Diego County, Matthew C. Braner, Judge. Reversed.

Linda Cianciolo for Appellant.

Stephen Temko and Dennis Temko for Respondent.

During a mediation, Rachel Peterson Kim (Wife) and Dennis Kim (Husband) resolved a number of disputes regarding the dissolution of their marriage, including disposition of Husband's employer stock plan. The parties' written settlement agreement

(fashioned as a stipulation to judgment) addresses the stock plan as follows: "100% to H. H to buy W out at market value as of the date of division. H's separate property interest confirmed to H." A dispute later arose regarding the meaning of the term "date of division"—Wife argued it referred to the date the parties memorialized their settlement (December 18, 2015); Husband argued primarily that it referred to the future date(s) on which he would actually exercise his stock options.

Based on "the four corners" of the parties' agreement, the family court found the term was "deliberately imprecise" and construed "date of division" to mean the date the court construed the term (November 29, 2017). Wife contends this construction is erroneous.

Based on our de novo review, we conclude Wife's proffered interpretation best reflects the parties' intent when resolving their dispute. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Husband and Wife were married in 1996 and had two children. Husband was an officer of Zafgen, Inc. (Zafgen), the stock of which is publicly traded on the NASDAQ stock exchange. In connection with his employment, Husband received Zafgen stock options under the Zafgen, Inc. Stock Plan (stock plan).[1] The couple separated in January 2015 and Wife filed a petition for dissolution.

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1 The stock plan is not in the appellate record.

The Stipulation

As a result of mediation, on December 18, 2015, Husband and Wife (and their respective counsel, each a Certified Family Law Specialist) signed a "Stipulation to Judgment Pursuant to Code of Civil Procedure Section 664.6" (the Stipulation) that resolved a variety of disputes. The Stipulation states that its terms "shall be incorporated into the judgment in this case" and that the agreement may be "enforced as a judgment under Code of Civil Procedure section 664.6."

The main body of the Stipulation addresses disposition of the marital home,[2] child custody, and child and spousal support.[3] An attachment to the Stipulation titled "Community Property" addresses division of community property.

With respect to the Community Property attachment, paragraph 1 of the Stipulation states: "Attached hereto and incorporated herein by this reference is a sheet entitled 'Community Property' which assigns the division of community property and confirmation of separate property to the parties in this case." Paragraph 17 of the Stipulation confirms the parties' agreement "that the division of community property stated herein is an equal division of community property."

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2 The parties agreed to "list the residence . . . early in the 2016 . . . season" and to "divide the proceeds of sale after deducting the costs of sale and after further agreement upon an equalization payment."

3 For support based on Husband's salary, the parties agreed Husband would begin making specified child and spousal support payments "[e]ffective January 1, 2016." For support based on Husband's "variable income in addition to salary," the parties agreed he would pay additional support according to a referenced formula. A handwritten interlineation specifies the variable payments shall "be made within 30 days of receipt."

The Community Property attachment consists of a table with three columns, respectively captioned "Asset," "To Husband," and "To Wife." The "Asset" column includes rows for the marital residence; furniture; vehicles; checking, savings, IRA, and college savings accounts; the stock plan; and a pension plan account. In the stock plan row, the following entry appears in the "To Husband" column: "100% to H. H to buy W out at market value as of the date of division. H's separate property interest confirmed to H." There is no corresponding entry in the "To Wife" column.

The Stipulation and Community Property attachment also reference a stipulated order dated November 23, 2015, through which the parties resolved an earlier dispute regarding the appropriate characterization and tax treatment of proceeds resulting from the exercise of 40,000 Zafgen stock options in September 2015.

The Stipulation Is Entered As a Judgment

In May 2016, Husband filed a request for order asking the court to enter the Stipulation as a judgment under Code of Civil Procedure section 664.6. In a supporting declaration, Husband explained that his counsel sent Wife's counsel "a formal Marital Settlement Agreement and Stipulation to Judgment" about three months after they signed the Stipulation described above, but Wife's counsel never responded.

The family court granted Husband's request and entered the Stipulation as a judgment of dissolution on July 5, 2016.

The Dispute Over the Stock Plan

About two months later (on August 22), Wife filed a request for order seeking the court's assistance on several issues, including reconciling competing accountant reports

regarding the proceeds of the exercised 40,000 Zafgen stock options addressed by the November 2015 stipulation.

In the process of meeting and conferring regarding the issues raised in Wife's request for order, the parties discovered they disagreed about an additional issue: the meaning of "date of division" as it relates to the stock plan. In correspondence dated August 23, Husband proposed valuing the Zafgen options at "what the stock closed at yesterday." In a response the next day, Wife countered that "the 'date of division' would be the date that the Stipulation was executed, as the Stipulation purported to immediately divide 100% to [Husband]."[4]

When the parties could not resolve this dispute, Wife amended her request for order to include it. In a supporting declaration, Wife expressed her "contention that the 'date of division' is the date of execution of the judgment, December 18, 2015, as that was the date that it was agreed that [Husband] would receive 100% of the stock and [Wife] would receive the market value."

The parties' briefing to the family court indicated they had resolved all of their disputes except for construing the term "date of division." As to this issue, Wife reiterated her view that the court should construe the term to mean "the date the agreement was signed, December 18, 2015." She reasoned this was consistent with the parties' intent to equally divide their community property because she "reached other

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4 It is unclear from the record whether the family court admitted the parties' correspondence into evidence. In any event, we cite the correspondence only for historical context.

aspects of the agreement in conjunction with the equalization of the Zafgen stock . . . based on the rate the stock was trading the day of their agreement."

In his brief, Husband argued the court was limited to considering the " '[f]our [c]orners' " of the Stipulation. According to its plain meaning, Husband argued "date of division" did not mean "the date of separation, or the date the parties signed [the Stipulation], or any other date, but rather the date the parties actually divide the stock, which has yet to occur."[5]

In the alternative, Husband argued the stock plan should be valued as of the date of the hearing.[6] Husband reasoned this would be the only way to ensure Wife shared in the risk of the stock plan's fluctuating value. To this end, Husband represented in his brief that "the value of Zafgen, Inc. stock plummeted between December 18, 2015, wherein the value closed on the NASDAQ at $7.17/share to $3.40/share on September 21, 2017."

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5 Husband's counsel clarified at the hearing that such an actual division would occur when Husband "trigger[ed]" a valuation event by exercising, selling, redeeming—"[t]here's so many terms"—his stock options.

6 Husband based this alternative argument on Family Code section 2552, subdivision (a), which states: "For the purpose of division of the community estate upon dissolution of marriage or legal separation of the parties, except as provided in subdivision (b), the court shall value the assets and liabilities as near as practicable to the time of trial." Subdivision (b) of this section allows parties to seek alternative valuation dates upon a noticed motion and showing of good cause. Further statutory references are to the Family Code unless otherwise indicated.

The Family Court's Ruling

The court heard the matter on September 20, 2017.[7] After issuing a proposed statement of decision, to which Wife objected, the family court issued a final statement of decision on January 19, 2018.[8]

Applying general contract interpretation principles to the "four corners" of the Stipulation, the family court found that "the plain language of the clause describing the division of the stock plan" is "deliberately imprecise" and "anticipates a date later than the December 18, 2015, signing date of the Stipulation . . . ." The court reasoned that because "the parties knew how to and often did set forth explicit dates or explicit values" for other items, it would have been "a simple matter for the parties to have simply set out a specific date, especially the December 18, 2015 date the parties executed their Stipulated Judgment, if that is what the parties intended."

The court also noted that while there were "many interlineations" adding to or clarifying other terms of the Stipulation, there were no such interlineations on the "date of division" clause, indicating to the court that "neither party was concerned with either augmenting or clarifying the language regarding the sale of the stock plan."

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7 Apparently by agreement, the parties presented no evidence, only legal argument by counsel. The court considered taking limited testimony from the parties, but decided against doing so after learning the disputed term was agreed to during a mediation.

8 Husband moves to strike Wife's reply brief because it includes factual assertions regarding the filing of the final statement of decision and the notice of appeal that are not supported by citations to the appellate record. Wife opposed the motion. We deny Husband's motion as moot because the unsupported factual assertions in Wife's reply brief are unnecessary to our resolution of this appeal.

Having rejected Wife's proffered interpretation, the court—without addressing Husband's primary proffered interpretation that "date of division" means the date on which he actually exercises stock options—defaulted to section 2552's date-of-trial valuation. The court found that the trial date was the date the court took the matter under submission and completed its analysis (November 29, 2017). Using that date, the court found the closing price of Zafgen stock was $3.77 per share.[9]

Wife appeals.

DISCUSSION

Wife contends the family court erred by construing "date of division" to mean some date other than the date the parties entered into the Stipulation. We agree.

A. *Interpretation Principles*

" 'Marital settlement agreements incorporated into a dissolution judgment are construed under the statutory rules governing the interpretations of contracts generally.' " (*In re Marriage of Simundza* (2004) 121 Cal.App.4th 1513, 1518 (*Simundza*).)

"We interpret a contract to give effect to the mutual intention of the parties at the time they formed the contract. [Citations.] We discern the parties' intention based on the written contract alone, if possible, but may also consider the circumstances under which the contract was made and its subject matter. [Citations.] We consider the contract as a

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9 The court did not explain the evidentiary basis for this finding. Presumably, the court took judicial notice of stock exchange records. (See *In re Marriage of Brigden* (1978) 80 Cal.App.3d 380, 385 [taking judicial notice of the closing price of a publicly traded stock].)

whole, and interpret contested provisions in their context, not in isolation, with the aim of giving effect to all provisions, if doing so is reasonably possible. [Citations.] [¶] In interpreting a contract, we give the words their ordinary and popular meaning, unless the parties or usage have given the words a specialized or technical meaning. [Citations.]" (*Camacho v. Target Corp*. (2018) 24 Cal.App.5th 291, 306; see *Simundza*, *supra*, 121 Cal.App.4th at p. 1518.)

"When, as here, no conflicting extrinsic evidence is offered of an interpretation as to which the language of a marital settlement agreement is reasonably susceptible, and the facts are otherwise undisputed, we apply the unambiguous contract terms to the undisputed facts as a matter of law." (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439; see *In re Marriage of Rosenfeld & Gross* (2014) 225 Cal.App.4th 478, 488 ["because no extrinsic evidence was considered, we are not bound by the trial court's construction and interpret the terms of the MSA de novo"].)

B. *Analysis*

Wife argued in the family court (as she does on appeal) that the parties intended the term "date of division" to mean the date the parties entered into the Stipulation. Husband primarily argued below that the disputed term means "the date the parties actually divide the stock" by exercising, redeeming, or selling it. Based on our de novo review of the Stipulation as a whole, we conclude the term "date of division" is most reasonably susceptible to Wife's proffered interpretation.

First, the overall context of the Stipulation supports this reading. The Stipulation was the product of a mediation that resolved outstanding custody, support, and property

division issues. Consistent with this global approach, Wife represented below that she "reached other aspects of the agreement in conjunction with the equalization of the Zafgen stock . . . based on the rate the stock was trading the day of their agreement." Husband, Wife, and their respective certified family law specialists signed the Stipulation as of December 18, 2015, and it appears they intended that it would become effective immediately (e.g., it addressed support obligations due within two weeks).[10] (See *Litke O'Farrell, LLC v. Tipton* (2012) 204 Cal.App.4th 1178, 1183-1184 (*Litke*) [stipulations to judgment are generally effective upon execution even if the court does not enter judgment until later].)

Second, the plain language of the Stipulation supports Wife's interpretation. Paragraph 1 incorporates the Community Property attachment by reference and characterizes it as "assign[ing] the *division of community property* and confirmation of separate property to the parties in this case." (Italics added.) Paragraph 17 states that "[t]he parties agree that *the division of property* ***stated herein*** is an equal division of community property." (Italics and bolding added.) Taken together, these provisions

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10 Husband contends uncontroverted extrinsic evidence shows Wife did not intend for the Stipulation to be immediately effective because she "refused to sign" it and, then, "once she signed [it], she refused to file it." Husband's record citations do not support his contention. First, the record shows Wife signed the Stipulation on the same day as Husband and the parties' respective counsel. Second, uncontroverted evidence does not show that Wife "refused to file" the Stipulation. To the contrary, the record suggests the delay in filing was occasioned by Husband's counsel's proposal of a "formal" marital settlement agreement to replace the Stipulation. We will not consider controverted extrinsic evidence in the first instance.

express the parties' understanding that the Stipulation effectuated their division of the community estate.

Third, the format of the Community Property attachment reinforces our interpretation. The first column, titled "Assets," identifies more than 25 specific accounts and property items. The next two columns *divide* those items by indicating the interest allocated "To Husband" and/or "To Wife." Significantly, the attachment allocates the stock plan "100% to H[usband]." This was the division the parties effectuated when they entered into the Stipulation on December 18, 2015.

We find this language and context more compelling than the fact (as Husband points out) that certain other provisions include specific dates or values. For example, the fact the Stipulation specified the date on which Husband's support obligations would commence—"[e]ffective January 1, 2016"—is not particularly significant because the effective date is merely the first day of the first month after the parties entered into the Stipulation. Likewise, the fact the Community Property attachment included specified values for the parties' vehicles is not particularly significant because determining the value of a used vehicle would likely be subject to more dispute than determining the value of a publicly traded stock.

On the other hand, the term "date of division" is not reasonably susceptible to Husband's originally proffered interpretation—"the date the parties actually divide the stock" by exercising, redeeming, or selling it. None of these words (or anything remotely similar) appear in the provision dividing the stock plan. Nor does Husband's interpretation address when (if ever) Husband must exercise his stock options, whether he

may exercise them piecemeal, or how quickly he must remit an equalizing payment to Wife based on the proceeds of exercised options. If the parties intended the division to be effectuated by some future triggering event, they likely would have said so and explained how they would effectuate the division.

Indeed, that is precisely what the parties did when addressing Husband's potential variable income. The typewritten Stipulation specifies the formula for dividing the income, and a handwritten interlineation specifies this "[p]ayment [is] to be made within 30 days of receipt." If the parties intended that the date of division of the stock plan would be the future dates on which Husband actually exercised options, the parties would likely have drafted the stock plan division provision similarly to the variable income division provision. They did not.

Perhaps tellingly, Husband does not argue on appeal that his originally proffered interpretation prevails. Instead, he maintains the family court properly selected the hearing date as the "date of division." We disagree.

Our primary task in construing the Stipulation is to ascertain the parties' intent. Nothing in the Stipulation indicates the parties intended the term "date of division" to mean the date on which the court ultimately resolved some as-yet unforeseen dispute. Indeed, Husband properly acknowledges that section 2552's date-of-trial valuation default does not apply when, as here, the parties have contracted for some other valuation date. (See *Litke, supra*, 204 Cal.App.4th at pp. 1183-1184; *In re Marriage of Campi* (2013) 212 Cal.App.4th 1565, 1574 [section 2552 "by its terms does not prevent the

parties from valuing and dividing property before a trial, which is in fact common in contested dissolutions"].)[11]

Husband argues "[t]he parties could not have intended [Wife's] interpretation as it would result in great prejudice to" him, presumably because he would have to buy out her interest at a higher valuation than the stock is currently worth. But on the other hand, a date of division other than December 18, 2015, could result in great prejudice to Wife because she claims to have factored the stock's value as of December 18, 2015, into her assessment of the equal division of the entire community estate as of that date.

In this vein, Husband argues that even if Wife is correct that the parties intended the date of division to be December 15, 2018, she "cannot demonstrate prejudice because she failed to admit any evidence that demonstrated what Zafgen's stock price was as of December 15, 2015." However, Husband represented in his briefing to the family court that the value of Zafgen stock "plummeted" from $7.17 per share on December 18, 2015 to $3.26 on September 21, 2017. Husband is bound by this admission. (See *Monzon v. Schaefer Ambulance Service, Inc*. (1990) 224 Cal.App.3d 16, 23, fn. 1 ["a reviewing court may make use of statements" in a party's trial court briefs "as admissions against the party"]; *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1515, fn. 19.)

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11 We disagree with Husband's assertion that the family court did not rely on section 2552 in selecting the "date of division." To the contrary, the record shows the court found "that by operation of law, *and pursuant to subdivision (a) of FC§2552*, the date of division is determined as close as practicable to the trial/final hearing *on the issue of the date of division.*" (First italics added.)

DISPOSITION

The order is reversed and the matter is remanded for further proceedings consistent with this opinion. The parties are to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.